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FEB 26 1945
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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 984

WESTERN ELECTRIC COMPANY, INCORPORATED,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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February 26, 1945.

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Western Electric Company, Incorporated (hereinafter called the "Company"), prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fourth Circuit to review the decree of that Court (R. 347) entered in the above entitled cause on January 3, 1945, denying a petition to review and set aside, and enforcing, an order (R. 97-9) of the National Labor Relations Board (hereinafter called the "Board"), dated August 9, 1944, under Section 10 of the National Labor Relations Act, 49 Stat., 449 (hereinafter called the "Act"), directing the Company to disestablish Point Breeze Employees Association, Inc., the union representing its employees at its Point Breeze, Baltimore, Md. plant, and to cease interfering with

its employees at such plant in the exercise of the rights guaranteed by Section 7 of the Act.

A stay of mandate pending the determination of this application and any subsequent proceedings in this Court was issued by the Circuit Court of Appeals on January 27, 1945 (R. 348).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 10(e) of the Act and Section 240(a) of the Judicial Code as amended, 28 U. S. C., Section 347(a).

Summary Statement.

The matter involved is a decree by the Circuit Court of Appeals for the Fourth Circuit enforcing an order by the Board, which concluded that the Company had violated Section 8(2) of the Act by "dominating" Point Breeze Employees Association, Inc., the labor union which since 1937 has been the recognized bargaining agent of the Company's hourly rated non-supervisory employees (over 5,000) at its Point Breeze, Baltimore, plant, and directed disestablishment of that Union. Judge Soper filed a strong dissenting opinion (R. 332-46).

The Company is the manufacturing subsidiary of American Telephone & Telegraph Company, and is engaged almost exclusively in the production of vital communications equipment for the Army and Navy (R. 17, 71).

In April, 1937, the Company terminated an employee representation plan which had been in existence since 1933 (R. 74).

Point Breeze Employees Association, Inc. (hereinafter called the Union) is a Maryland membership corporation (R. 353) formed by the employees of the Point Breeze plant and adopted as bargaining agent by an overwhelming vote at an election by secret ballot in June, 1937 (R. 79-81). The election was conducted by the employees off

Company property and without any advice, assistance or participation on the part of the Company. No complaint about the Union was ever made by any employee during the six years prior to the hearing. The proceeding is based on a charge filed in July, 1943, on behalf of International Association of Machinists by a non-employee organizer (R. 36).

In ordering the disestablishment of the Union, the Board professed to be acting upon a "congeries of facts" (R. 330) claimed to show that the Union was dominated by the Company in its formation in 1937. The principal element of this so-called "congeries" is that *despite the fact that the employees had full knowledge of an announcement by the Company in April, 1937, that the employee representation plan was terminated and that the Company was indifferent as to the choice which the employees might make as to their bargaining agent,* this knowledge on the part of the employees must be deemed insufficient since it did not come in the form of a notice direct from the Company to the individual employees (R. 74, 90). The Board also relied on organizational acts of the employees themselves (R. 76-83, 91-3), as to which it is not even claimed that the Company had any participation or made any suggestion or rendered any assistance, and upon the fact that the Company, as was its legal duty under the Act, recognized a committee elected by an overwhelming majority of the employee body at an election in April, 1937, prior to the organization of the Union, as their bargaining agency for a period of 60 days (R. 79, 91). At the time of this recognition, there was no organizational effort on behalf of any other labor organization (R. 86).

The record contains no evidence whatever that the Union is in fact dominated by the Company, and the Board reached its conclusion of "domination" and issued its order of disestablishment without giving any consideration to the undisputed evidence establishing that the Union is not domi-

nated in fact but is, on the contrary, aggressive and militant. Included in this evidence, all of which is ignored by the Board in its decision, is the report of a panel of the War Labor Board in a hotly disputed case between the Company and the Union in which the panel commented on the aggressiveness of the parties and concluded by saying "This Company and this Union should be encouraged to draw closer together for the benefit of all concerned." (R. 32)

The Board also concluded (R. 84-90, 97) that the Company had interfered with its employees in violation of Section 8(1) of the Act, based on a few alleged incidents occurring between November 1941 and the date of the hearing, incidents with respect to which the Trial Examiner had concluded there was no "substantial credible evidence" (R. 59) and which, even if given credence, involved only 6 supervisory employees at the lowest levels out of over 400, and only 7 out of over 5,000 employees, entailed no disciplinary or discriminatory action of any nature against any employee, are not claimed to have influenced the acts of any employee, and were all well within the exercise of the constitutional right of freedom of speech.

The majority opinion of the Circuit Court of Appeals (R. 323-32) sustains the conclusions of the Board by relying heavily, among other things, on matters not relied on by the Board or as to which the Board made no finding.

Judge Soper's dissenting opinion of 15 pages (R. 332-46) reviews in detail the matters relied upon by the Board, and concludes that as a matter of law there was "no evidence" of domination or interference and "no evidence, worthy of the name" that the Company favored the Union over the I. A. M., the charging labor organization (R. 332). Judge Soper also holds that the report of the panel of the War Labor Board and other undisputed sub-

stantial evidence ignored by the Board show conclusively that the Union is not dominated but is actually independent and aggressive (R. 341-3).

The Company contends that the Decision and Order of the Board and the decision of the majority of the Circuit Court of Appeals conflict with applicable decisions of this Court and of other Circuit Courts of Appeals, and involve important questions in the administration of the Act which have not been, but should be, settled by this Court. A question of improper limitation upon freedom of speech is also involved.

The Questions Presented.

1. May a reviewing court sustain the action of an administrative agency upon grounds upon which the agency itself did not rely, including facts not found by the agency to have occurred? (See (1) under "Reasons" [p. 7] and Point I of Brief [pp. 14-8].)

2. May the Board conclude that a union is dominated, in the absence of any evidence of actual domination and without reviewing and appraising substantial undisputed evidence that the union is actually not dominated but is aggressive and militant, including a report of a panel of the War Labor Board to that effect? (See (2) under "Reasons" [pp. 7-8] and Point II of Brief [pp. 18-23].)

3. May the Board conclude that knowledge by a company's employees of the company's announcement of termination of an employee representation plan and of its neutrality as to their organizational activities is insufficient to constitute a sufficient line of cleavage between the terminated plan and a union subsequently formed, for the reason that they did not acquire such knowledge directly from the company? (See (3) under "Reasons" [pp. 8-9] and Point III of Brief [pp. 23-9].)

4. May the Board base a conclusion that a union was dominated in its formation on organizational activities of the employees themselves, as to which there is no claim that the company in any way advised, assisted or interfered? (See (4) under "Reasons" [p. 9] and Point IV of Brief [pp. 29-30].)

5. May the Board base a conclusion of domination of a union by a company on the fact of performance by the company of its legal duty under the Act of recognizing a committee of employees selected by an overwhelming majority of such employees as their collective bargaining agent, for a period of sixty days, prior to the organization of the union, when there was no organizational effort on behalf of any labor organization other than the union? (See (5) under "Reasons" [p. 10] and Point V of Brief [pp. 31-2].)

6. May the Board base a conclusion of Company domination of a Union formed in 1937, and of interference, on certain alleged incidents (R. 85-9), (a) as to which the Trial Examiner found there was "no substantial credible evidence" (R. 59), (b) which, even if given credence, took place on only a few occasions from and after November, 1941, to July, 1943, (c) which involved only 6 out of over 400 supervisory employees, all at the lowest levels, and only 7 non-supervisory employees out of over 5,000, (d) which entailed no disciplinary or discriminatory action by the Company against any employee and are not claimed to have influenced the action of any employee, and (e) which could amount to no more than the exercise of the right of free speech guaranteed by the Constitution of the United States? (See (6) under "Reasons" [pp. 10-11] and Point VI of Brief [pp. 32-5].)

Reasons Relied on for the Allowance of the Writ.

(1) This Court has held in *Labor Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 478-80 (1941), *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80, 95 (1943), and *Florida* v. *United States*, 282 U. S. 194, 214-15 (1931), and in other cases, that the order of an administrative agency cannot be upheld unless the grounds upon which it acted are stated by it and such grounds can be sustained. Here the majority of the Circuit Court of Appeals rely heavily on matters (set forth in the attached Brief, pp. 14-6) not stated by the Board to be grounds upon which it relied, including facts not even found by the Board to have occurred, and sustained the Board on the combined and inseparable basis of such matters and others. It is the function of the Board, not the Circuit Court of Appeals, to state whether or not it relies on such matters as grounds for its conclusions. This usurpation by the Circuit Court of Appeals of the function of the Board is clearly contrary to principles of administrative law laid down by this Court. (See Point I of Brief [pp. 14-8].)

(2) The decision of the Circuit Court of Appeals is in conflict with the holding of this Court in *Labor Board* v. *Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50 (1943). In that case this Court held that the ultimate issue in an alleged "domination" case under the Act is whether the labor organization in question is at the time of the proceeding actually dominated, and that it is the duty of the Board to review and appraise the evidence as to the present actual domination or independence of such labor organization. Here the Circuit Court of Appeals sustained the order of the Board, based on its conclusion of domination, notwithstanding that there was no evidence of actual domination and the Board did not in its decision review and appraise the very substantial evidence showing

that the Union is not actually dominated but on the contrary is aggressive and militant. Included in this evidence is a report by a panel of the War Labor Board to that effect.

That the Board must make such a review and appraisal in order to make a proper finding of domination or independence is an important requirement in the administration of the Act.

The importance of this requirement is emphasized by the fact that the Board ignored the report and recommendation of a coordinate federal agency. As Judge Soper said in his dissent in summarizing the substantial evidence of independence of the Union (R. 341-3), it is abhorrent and harassing for a company to be told by one federal agency, the War Labor Board, that it must draw closer to a labor organization in the interests of the war effort and, at the same time, to have another federal agency, the National Labor Relations Board, tell the same company to have no relations with the same labor organization. The company is expected to obey both. (See Point II of Brief [pp. 18-23].)

(3) On another important matter in the administration of the Act, the decision of the Circuit Court of Appeals for the Fourth Circuit is in conflict with a decision of the Circuit Court of Appeals for the Seventh Circuit, and is so recognized by Judge Soper in his dissent (R. 335).

In *Labor Board* v. *Duncan Foundry & Machine Works, Inc.*, 142 F. 2d 594, 596 (C. C. A. 7, 1944), the Circuit Court of Appeals for the Seventh Circuit held that in order that there might be an undominated independent union after termination of an illegal employee representation plan, there was no requirement that the company's announcement of termination of the plan and its indifference to the employees' organizational efforts be given in any particular "formal mechanical pattern" directly by the company to its employees as a whole, so long as the company did make the announcement and the company's position is actually

known by the employees. In the case at bar the majority of the Circuit Court of Appeals for the Fourth Circuit has sustained a conclusion of the Board that the Union was dominated by the Company in its formation in 1937, based fundamentally on the ground that the Company did not make its announcement directly to its employees as a whole in some particular "formal mechanical pattern," *notwithstanding that the Company made the announcement and the Board itself found that it became a matter of general knowledge among the employee body* (R. 74).

This finding of the Board definitely determines that the employees had knowledge of the Company's announcement. Consequently the case squarely presents the issue of whether there is any requirement of law that the knowledge must be acquired by some particular method (See Point III of Brief [pp. 23-9]).

(4) The Circuit Courts of Appeals for the Fifth and Seventh Circuits have held in the cases cited in the attached brief (*infra*, p. 30) that acts by the employees themselves, not instigated or participated in by a company, in the formation of a labor organization cannot be relied on by the Board as the basis of a conclusion of domination of the labor organization by the company.

Directly contrary to these decisions in other Circuits, the Circuit Court of Appeals for the Fourth Circuit has here sustained a conclusion of the Board that the Union in its formation was dominated by the Company, based on acts of the employees themselves, as to which it is not even claimed that the Company participated or made any suggestions or gave any assistance.

It is clear that this is a matter of great importance in the administration of the Act which has not been, but should be, settled by this Court. (See Point IV of Brief [pp. 29-30].)

(5) The Circuit Courts of Appeals for the Ninth, Eighth and Seventh Circuits, in cases cited in the attached brief (*infra*, p. 31), have held that the performance by a company of its legal duty under the Act of recognizing a bargaining agency elected by a majority of its employees cannot be the basis of a conclusion of domination by the company, particularly where, as in this case, there was no other labor organization making a contest or even an organizational effort at the plant.

The decision of the Circuit Court of Appeals for the Fourth Circuit in this case is directly to the contrary. (See Point V of Brief [pp. 31-2].)

(6) There is in this case no background of Company hostility to unions which would serve to give significance to the alleged incidents of interference on which the Board relied, or make them attributable to the Company. In these circumstances, we submit that, as Judge Soper's review shows (R. 343-6), both the Board and the majority of the Circuit Court of Appeals have laid down an erroneous principle of substantial importance in the administration of the Act, in approving the use, either on the issue of domination in the formation of the Union in 1937, or on the issue of interference, of alleged incidents which, if they occurred at all,

> (a) did not first occur until 1941 and thereafter took place on only a few scattered occasions;
>
> (b) involved only 6 supervisory employees, all at the lowest levels of supervision, out of a total of over 400 and only 7 non-supervisory employees out of over 5,000;
>
> (c) in no instance involved any coercion or disciplinary action or influenced the action of a single employee;
>
> (d) entailed no expression or implication that the Company, or any policy-making official of the

Company, prompted the action of the supervisor involved; and

(e) even if attributable to the Company, were plain instances of the exercise of the right of free speech guaranteed by the Constitution of the United States.

The decision of the Circuit Court of Appeals for the Fourth Circuit herein is in this respect in conflict with the decisions of this Court and of the Circuit Courts of Appeals for the Second, Third and Fifth Circuits cited in the attached brief. (See Point VI of Brief [pp. 32-5].)

If this decision of the majority of the Circuit Court of Appeals stands, it will result in irreparable injustice and injury to the Company and to its employees at the Point Breeze plant.

The Company will stand convicted before its employees of having engaged in unfair labor practices and of having dominated the formation of a labor organization of its employees, notwithstanding that neither the Company nor any upper-level supervisor is even claimed to have committed a single improper act at any time or to have had anything to do with the organization of the Union.

The employees at the Point Breeze plant will be deprived of a free choice of a labor organization to represent them as bargaining agent, because the Union will not be permitted to appear on the ballot in the forthcoming election in the representation case now pending before the Board, brought by the I. A. M., the charging union herein.

The only way the employees will obtain a free choice in the forthcoming election and the policy of the Act will be carried out, is to reverse the Board's order so as to permit the Union to appear on the ballot along with the I. A. M., as pointed out by counsel for the Union in the

argument before the Circuit Court of Appeals. It is the policy of the Act to protect the employees in their free choice and not to benefit any one union, such as the I. A. M.

WHEREFORE, it is respectfully submitted that because of the importance in the administration of the Act of the questions presented and the other reasons set forth above, this petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Fourth Circuit should be granted.

WESTERN ELECTRIC COMPANY, INCORPORATED,
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February 26, 1945.